UNITED STATES TAX COURT

WASHINGTON, DC 20217

EATON CORPORATION AND SUBSIDIARIES, Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent	)	Docket No. 5576-12.

ORDER

Pursuant to the Court's Order dated August 22, 2013, respondent submitted four documents under seal to the undersigned for an in camera review. The purpose of the review was to determine whether the privilege claim respondent asserted with respect to each document is valid. Specifically, respondent claims that the attorney work product doctrine fully protects a memorandum dated December 5, 2011 (2011 memo), and the deliberative process privilege fully protects two drafts of an advance pricing agreement (APA) memorandum dated December 12, 2003 (blueline 2003 memo and redline 2003 memo, respectively), and partially protects both a renewal APA memorandum dated September 13, 2006 (2006 memo) and the 2011 memo.

Documents that are protected from disclosure by a privilege are beyond the scope of discovery. Rule 70(b).[1] The Court applies relevant holdings of the Court of Appeals for the District of Columbia Circuit in resolving contested privilege claims. Sec. 7453; Bernardo v. Commissioner, 104 T.C. 677, 682 (1995). The party relying on a privilege to protect a document from disclosure bears the burden of establishing that the privilege applies. Id. Once the privilege is established, the party asserting an exception to the privilege normally bears the burden of production to show that the exception has some foundation in fact. See

[1]Rule references are to the Tax Court Rules of Practice and Procedure and section references are to the Internal Revenue Code of 1986, as amended.

Countryside Ltd. P'ship v. Commissioner, 132 T.C. 347, 349 (2009); see also In re Sealed Case, 107 F.3d 46, 49 (D.C. Cir. 1997).

Work Product Doctrine

The work product doctrine protects from disclosure documents and other tangible things prepared or created by an attorney in anticipation of litigation or trial. Hickman v. Taylor, 329 U.S. 495, 510-511 (1947). A document is protected from disclosure as attorney work product if the document was prepared "because of" expected or anticipated litigation. See United States v. Deloitte LLP, 610 F.3d 129, 137 (D.C. Cir. 2010) ("Like most circuits, we apply the 'because of' test, asking 'whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.'")

By letter dated September 30, 2009, petitioner's Senior Vice President-Taxes informed IRS officials that petitioner intended to withdraw from a supplemental APA for 2006 to 2010, an APA renewal for 2011-2015, and a related memorandum of understanding, and would "seek the protection of the courts for this matter." By July 2011, the IRS Examination division informed petitioner that it proposed to make adjustments to its transfer pricing for 2005 and 2006.

Patricia M. Lacey, an attorney and the APA Branch Chief who authored the 2011 memo, submitted an amended declaration to the Court stating that her primary purpose in preparing the 2011 memo was "to provide Respondent's trial lawyers with my conclusions, opinions, recommendations, and advice concerning the Service's review of Petitioner's APA Annual Reports for Respondent's litigators' use in any subsequent litigation." She also declared that the 2011 memo was prepared to provide: (1) the IRS Director of the APA Program with her conclusions regarding (a) petitioner's compliance with original and renewal APAs, and (b) some information petitioner provided during the APA application process; and (2) information to the Associate Chief Counsel (International) for consideration in connection with his determination whether to cancel or revoke the original and renewal APAs. A review of the 2011 memo shows that it predominantly comprises detailed legal analysis, opinions, and conclusions normally protected by the attorney work product doctrine.

Petitioner cites Rev. Proc. 96-53, 1996-2 C.B. 375, and Rev. Proc. 2004-40, 2004-2 C.B. 50, the administrative procedures governing the APAs in question,

and asserts (contrary to Ms. Lacey's declaration) that the 2011 memo was not the product of "a review motivated by potential litigation" but was written in connection with an examination of tax years that were the subject of an APA. Petitioner cites caselaw, including United States v. Deloitte LLP, 610 F.3d at 138, for the proposition that a document is not protected from disclosure under the work product doctrine if it would have been prepared in substantially similar form regardless of the prospect of litigation.

Although Ms. Lacey admits that the 2011 memo served more than one purpose, our review of the document bears out her statement that it was prepared primarily "to provide Respondent's trial lawyers with my conclusions, opinions, recommendations, and advice concerning the Service's review of Petitioner's APA Annual Reports for Respondent's litigators' use in any subsequent litigation." We also note that the IRS set forth its reasons for canceling the disputed APAs in a letter to petitioner dated December 16, 2011. Considering all the circumstances, and in the absence of any authority suggesting that respondent was obliged to prepare a similarly detailed legal analysis in connection with the cancellation of the APAs, we are not convinced that the 2011 memo would have been written regardless of the litigation respondent reasonably anticipated in this case. In sum, we conclude that the document is protected from discovery as attorney work product.

We reject petitioner's argument that respondent waived the right to rely on the work product doctrine to protect the 2011 memo from disclosure by placing his knowledge or intent at issue in this case.[2] As previously mentioned, the IRS set forth its reasons for canceling the disputed APAs in a letter to petitioner dated December 16, 2011. To the extent that petitioner seeks more details related to this subject, petitioner has failed to show that the information cannot be obtained through less intrusive means. See Rule 70(c). Indeed, the record begs the question why petitioner would not simply ask respondent by way of informal consultations (and failing that by formal interrogatory) to provide a detailed explanation of the facts underlying the decision to cancel the APAs.

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[2]Petitioner mischaracterizes the 2011 memo as a "contemporaneous" document that reflects what respondent knew about petitioner. In fact, the 2011 memo was drafted many years after the APAs in dispute were negotiated and executed.

Deliberative Process Privilege

The Supreme Court has observed that the deliberative process privilege, also known as executive privilege, advances "the policy of protecting the 'decision making processes of government agencies,' and focus[es] on documents 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" Nat'l Labor Relations Bd. v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975); see P.T. & L. Constr. Co., Inc. v. Commissioner, 63 T.C. 404, 409 (1974). The privilege is a qualified privilege that shields government materials that are predecisional and deliberative, see Tax Analysts v. IRS, 117 F.3d 607, 616 (D.C. Cir. 1997), but instances may arise in which justice will require disclosure of such material, P.T. & L. Constr. Co., Inc. v. Commissioner, 63 T.C. at 409.

We agree with respondent that the deliberative process privilege fully protects both the blueline 2003 memo and the redline 2003 memo. Those memos were predecisional draft summaries of the APA that the parties executed in April 2004. The memos likewise are deliberative in that they show the "give-and-take of the consultative process" that the IRS engaged in during the negotiation and ultimate adoption of the APA. See, e.g., Coastal States Gas Corp. v. Dept. of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

We also agree with respondent that the deliberative process privilege partially protects the 2006 memo, although not to the full extent that respondent asserts. The 2006 memo is predecisional in that it was drafted shortly before the parties executed the renewal APA on December 20, 2006, and it contains the author's deliberations and recommendations. After reviewing the document, however, we conclude that the following individual sentences that respondent redacted before providing it to petitioner are not deliberative but rather are statements of fact or of agency policy and are required to be disclosed to petitioner:

–Page 4, second full paragraph, the third sentence beginning "In that connection";
–Page 4, third full paragraph, the first sentence beginning "In the course";
–Page 4, third full paragraph, the fourth sentence beginning "However, upon inquiry;
–Page 6, the second sentence of the paragraph titled "Cycle Time".

As a final matter, we conclude that petitioner's need for the documents under review does not outweigh respondent's interest in maintaining the confidentiality of its decision-making process.

Upon due consideration and for cause, it is

ORDERED that respondent's claims that (1) the 2011 memo is protected by the work product doctrine, and (2) the blueline 2003 memo and the redline 2003 memo are protected by the deliberative process privilege, are upheld. It is further

ORDERED that respondent's claim that the 2006 memo is partially protected by the deliberative process privilege is upheld, but only to the extent as more fully described in this Order. It is further

ORDERED that the Clerk of the Court shall return to respondent the above-referenced documents, resealed in the envelopes in which they were submitted to the Court. Thereafter, the parties shall proceed with discovery as set forth herein.

(Signed) Daniel A. Guy, Jr.
Special Trial Judge

Dated: Washington, D.C.
October 30, 2013